Indira Gandhi a/p Mutho v Ketua Polis Negara

HIGH COURT (IPOH) — APPLICATION FOR JUDICIAL REVIEW NO 25–13–06 OF 2014
LEE SWEE SENG J
27 OCTOBER 2014

Constitutional Law — Courts — Jurisdiction — Husband converted to Islam and obtained custody order of all three children from Syariah High Court — Order not served to wife — Wife filed for custody of children in civil High Court and obtained order — Husband did not surrender last child — Wife successfully obtained committal order requiring bailiff and police officer to execute order against husband — Inspector General of Police refused to execute warrant of committal and recovery order — Whether Inspector General of Police can refuse to execute committal order for contempt recovery order to enforce custody order of civil High Court

The applicant and one Pathmanathan were married according to the civil law marriage and had three children. When Pathmanathan converted to Islam, he obtained custody order of all the three children from the Syariah High Court. However, the Syariah Order was not served on the applicant and he did not take any action to enforce the order. At the same time, the applicant filed an application in the High Court for custody of the three children under the Law Reform (Marriage and Divorce) Act 1976 ('LRA') and obtained an order which was later served to Pathmanathan. Pathmanathan did not surrender the three children to the applicant. The two eldest children have been, all the while, with the applicant. The only child that was with Pathmanathan and for the purpose of the appeal was the youngest child who was taken away by Pathmanathan from the applicant without her consent. The applicant applied and successfully obtained a committal order containing a provision, inter alia, requiring the bailiff and a police officer to execute the order against Pathmanathan. The applicant also, at the same time, obtained a recovery order under s 53 of the Child Act 2001 ('the Child Act') directed at the bailiff and a police officer to go to the premises of Pathmanathan to search and take custody of the child. The respondent ('IGP') refused to execute the warrant of committal and the recovery order despite several letters being written for the same, on the ground that the police have been put in a quandary as they are faced with two conflicting court orders, ie, the Syariah Court granting custody to Pathmanathan and the High Court order granting custody to the applicant. The IGP took the position that to execute the custody order of the High Court would cause him to be in contempt of the Syariah Court. The sole issue before the court was whether the respondent ('IGP') can refuse to execute a committal order for contempt issued by this court against the father of the child Prasana

Diksa and also a recovery order directed at the police to enforce the custody order of the Civil High Court on ground that there was also a custody order that the said father had obtained before the Syariah Court.

Held, allowing the application:

(1) The IGP was laboring under the misconception that there were two conflicting orders; one from the Syariah Court giving custody of the youngest child to the father and another order from the Civil High Court giving custody to the mother. Whilst that may be so, there was no order of recovery issued by the Syariah Court requiring the police to search for the child and to recover the child. That was obvious as the child is for all intents and purposes with the father. The Syariah Court custody order was irrelevant. The father might not be happy with the finding of this court but until the recovery order and warrant of committal are stayed or set aside, it remained a valid order of this court and must be complied with (see paras 30 & 32).

(2) The IGP erred in law when he labored under the misapprehension that he might be subjected to a contempt action if he had refused to execute the custody order of the Syariah Court or if he had proceeded to execute the two orders of the Civil High Court (see para 30).

(3) Even if there is one, there was no mandamus order that might be issued by the Syariah Court against the IGP. The reason is obvious; the Syariah Court does not have the power to issue a prerogative writ and at any rate it has no jurisdiction over the IGP which is a public office that does not profess a religion unlike a human person and much less professing the religion of Islam. The IGP in not wanting, in the circumstance of this case where this court has clearly stated that it is this court's order that must be enforced, would be acting unreasonably and indeed illegally, in the language of administrative law (see para 39).

(4) It is too late in the day for the IGP to intervene in the contempt proceedings and the recovery action proceedings as both proceedings have been concluded. It has now become impossible for the IGP to intervene in the appeal of Patmanathan to the Court of Appeal because his appeal had been struck out by the Court of Appeal (see para 35).

(5) There are only the two Civil High Court orders for enforcement. The IGP then could not refuse enforcement of the Civil High Court orders as that would be a derelictions of his duty under the Police Act 1967. Only the police is empowered to enforce a warrant of committal and not layman or any other persons. So too the recovery order for under the Child Act where the resources of the State may be employed to trace and recover a child pursuant to an order issued by the court (see para 36).

[Bahasa Malaysia summary

Pemohon dan Pathmanathan telah berkahwin mengikut perkahwinan undang-undang sivil dan mempunyai tiga orang anak. Apabila Pathmanathan memeluk agama Islam, dia memperoleh perintah hak penjagaan ketiga-tiga anak-anak daripada Mahkamah Tinggi Syariah. Walau bagaimanapun, perintah Syariah itu tidak disampaikan ke atas pemohon dan dia tidak mengambil apa-apa tindakan untuk menguatkuasakan perintah itu. Pada masa sama, pemohon telah memfailkan permohonan di Mahkamah Tinggi untuk hak penjagaan ketiga-tiga anak itu di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APU') dan memperoleh perintah yang kemudian telah disampaikan ke atas Pathmanathan. Pathmanathan tidak menyerahkan ketiga-tiga anak itu kepada pemohon. Dua orang anak yang lebih tua selama ini, berada di bawah penjagaan pemohon. Seorang anak lagi yang bersama Pathmanathan dan bagi tujuan rayuan adalah anak bongsu yang telah diambil oleh Pathmanathan daripada pemohon tanpa persetujuannya. Pemohon telah memohon dan berjaya memperoleh perintah komital yang mengandungi peruntukan, antara lain, menghendaki bailif dan pegawai polis melaksanakan perintah terhadap Pathmanathan. Pemohon juga, pada masa sama, telah memperoleh perintah pemulihan di bawah s 53 Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak tersebut') mengarahkan bailif dan pegawai polis pergi ke premis Pathmanathan untuk mencari dan mengambil hak penjagaan anak itu. Responden ('IGP') enggan melaksanakan waran komital dan perintah pemulihan itu meskipun beberapa surat telah ditulis bagi tujuan yang sama, atas alasan bahawa pihak polis berada dalam keadaan sukar kerana mereka berhadapan dengan dua perintah mahkamah yang bertentangan, iaitu Mahkamah Syarikah memberikan hak penjagaan kepada Pathmanathan dan perintah Mahkamah Tinggi yang memberikan hak penjagaan kepada pemohon. IGP mengambil kedudukan bahawa untuk melaksanakan perintah hak penjagaan Mahkamah Tinggi akan menyebabkannya menghina Mahkamah Syariah. Satu-satunya isu di hadapan mahkamah adalah sama ada responden ('IGP') boleh menolak untuk melaksanakan perintah komital kerana penghinaan yang telah dikeluarkan oleh mahkamah ini terhadap bapa kepada anak bernama Prasana Diksa dan juga perintah pemulihan diarahkan kepada polis untuk menguatkuasakan perintah hak penjagaan Mahkamah Tinggi Sivil atas alasan terdapat juga perintah hak penjagaan yang telah diperoleh oleh bapa tersebut daripada Mahkamah Syariah.

Diputuskan, membenarkan permohonan:

(1) IGP bertindak di bawah salah faham bahawa terdapat dua perintah bertentangan; satu daripada Mahkamah Syariah yang memberikan hak penjagaan anak bongsu kepada bapa dan satu lagi perintah daripada Mahkamah Tinggi Sivil yang memberikan hak penjagaan kepada ibu. Tatkala ia mungkin begitu, tidak terdapat perintah pemulihan yang

dikeluarkan oleh Mahkamah Syariah yang menghendaki polis mencari anak itu dan mengembalikan anak itu. Ia adalah jelas kerana anak itu bagi semua niat dan tujuan berada dengan bapanya. Perintah hak penjagaan Mahkamah Syariah adalah tidak relevan. Bapa itu mungkin tidak gembira dengan penemuan mahkamah ini tetapi sehingga perintah pemulihan dan waran komital digantung atau diketepikan, ia masih perintah sah mahkamah ini dan hendaklah dipatuhi (lihat perenggan 30 & 32).

(2) IGP terkhilaf dari segi undang-undang apabila dia bertindak di bawah anggapan yang dia mungkin tertakluk kepada tindakan penghinaan jika dia enggan melaksanakan perintah hak penjagaan Mahkamah Syariah atau jika dia meneruskan dengan pelaksanaan dua perintah Mahkamah Tinggi Sivil (lihat perenggan 38).

(3) Jika pun terdapat sedemikian, tiada perintah mandamus yang mungkin dikeluarkan oleh Mahkamah Syariah terhadap IGP. Sebabnya adalah jelas; Mahkamah Syariah tidak mempunyai kuasa untuk mengeluarkan writ prerogatif dan tidak langsung mempunyai bidang kuasa ke atas IGP yang merupakan penjawat awam yang tidak menganut agama bukan seperti seorang manusa dan lebih lagi menganut agama Islam. IGP dalam keadaan tidak ingin, dalam keadaan kes ini di mana mahkamah ini jelas menyatakan bahawa ia adalah perintah mahkamah ini yang perlu dikuatkuasakan, akan bertindak tidak munasabah dan memang menyalahi undang-undang, dari segi undang-undang pentadbiran (lihat perenggan 39).

(4) Ia terlalu lewat untuk IGP campur tangan dalam prosiding penghinaan dan prosiding tindakan pemulihan kerana kedua-dua prosiding telah selesai. Ia sekarang menjadi mustahil untuk IGP campur tangan dalam rayuan Pathmanathan kepada Mahkamah Rayuan kerana rayuannya telah dibatalkan oleh Mahkamah Rayuan (lihat perenggan 35).

(5) Hanya terdapat dua perintah Mahkamah Tinggi Sivil untuk penguatkuasaan. IGP dengan itu tidak boleh menolak penguatkuasaan perintah-perintah Mahkamah Tinggi Sivil kerana ia adalah peninggalan tugasnya di bawah Akta Polis 1967. Hanya polis dberi kuasa menguatkuasakan waran komital dan bukan orang biasa atau sesiapa yang lain. Begitu juga perintah pemulihan kerana di bawah Akta Kanak-Kanak tersebut di mana sumber kerajaan negeri boleh digunakan untuk mengesan dan mengembalikan kanak-kanak menurut perintah yang dikeluarkan oleh mahkamah (lihat perenggan 36).]

Notes

For cases on jurisdiction, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2326–2357.

Cases referred to

Chavunduka and Another v Commissioner of Police and Another [2001] 2 LRC 77, SC (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Gu Kien Lee v Ketua Polis Daerah Kota Kinabalu Polis Diraja Malaysia [2012] 7 MLJ 733, HC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Another Appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa) [2015] 7 MLJ 153; [2014] AMEJ 0695; [2014] 1 LNS 559, HC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors [2013] 5 MLJ 552; [2013] 7 CLJ 82; [2013] 4 AMR 848, HC (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513, FC (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)

McGrath v Chief Constable of the Royal Ulster Constabulary and another [2001] 4 All ER 334, HL (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 AMR 433, FC (refd)

Regina v Commissioner of Police of the Metropolis, Ex Parte Blackburn [1968] 2 WLR 893, CA (refd)

SP Sampath Kumar v Union of India & Ors AIR 1987 SC 386 (refd)

Satyanarayana Tiwari v SHOPS Santhoshnagar, Hyderabad and others AIR 1982 AP 394, HC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney v John Walker and Sons [1934] 1 AC 365, HL (refd)

Legislation referred to

Child Act 2001 ss 52, 52(1), 53, 53(3)

Courts of Judicature Act 1964 ss 13, 16(d), 17, 25(2)

Criminal Procedure Code ss 107(1), 107A(1), 107A(2), 110(1), 120(1), 119

Federal Constitution arts 121, 126, 132 (1), Ninth Schedule, List II, Item I

Guardianship of Infants Act 1961

Indian Constitution art 226, 226(1)

Interpretation Acts 1948 and 1967

Penal Code s 403

Police Act 1967 ss 4(1), 5(1), 3(3), 20(3), 20(3)(a), (f), (j), (m), 32(1)

Rules of Court 2012 O 45, O 45 r 5(1)(a), 5(A), O 46, O 47, O 48, O 49,

O 50, O 51, O 52, O 52 r 10, O 53 Forms 83 , 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108
Specific Relief Act 1950 s 44, s 44(a)

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Lee Swee Seng J:

[1] What started as a private matter of custody in a divorce proceeding of a civil marriage has now metamorphosed and matured into issues of prime importance in the system of administration of justice in this land. It boils down to this: Can the inspector general of police ('IGP') as the respondent in this application for judicial review refuse to execute a committal order for contempt issued by this court against the father of the child Prasana Diksa and also a recovery order directed at the police to enforce the custody order of the Civil High Court on ground that there was also a custody order that the said father had obtained before the Syariah Court?

PROBLEM

[2] The chequered history of this case has been chronicled in two previous decisions of this court.

[3] First is the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552; [2013] 7 CLJ 82; [2013] 4 AMR 848, where Indira Gandhi successfully challenged the validity of the conversion to Islam of her three children in this court. The second is the case of *Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa)* [2015] 7 MLJ 153; [2014] AMEJ 0695; [2014] 1 LNS 559, where this court had found the father Patmanathan guilty of contempt and had issued a committal order for him to be committed to prison until his contempt is purged by the delivery up of the youngest child Prasana Diksa who was forcibly taken away from the mother Indira Gandhi when she was hardly one year old.

The child would now be six years old and Indira had not seen the child for some five years already.

[4] This court had also earlier on the same day as the granting of a committal order on 30 May 2014, granted a recovery order under s 53 of the Child Act 2001 directed at the police to search for the child and to retrieve her from whoever is keeping her and to return her to the mother.

[5] After both the recovery order and the warrant of committal were served on 13 June and 18 June 2014 respectively on the IGP, he had on a number of occasions declared that he would not execute both the orders as he is caught in a legal conundrum not of his own creation in that there are two orders from two different courts competing for compliance: one from the Syariah Court granting custody of the child to the father who had converted to Islam and another from the Civil High Court granting custody of the child to the mother.

[6] The IGP had confirmed in his affidavit filed the above stand was taken by him. Not to execute both orders would be in contempt of both the Syariah Court and the High Court. To execute the custody order of the High Court would cause him to be in contempt of the Syariah Court. Hence the legal quandary as submitted by Encik Noor Hisham bin Ismail, senior federal counsel ('SFC') for the IGP.

PRAYER

[7] Indira Gandhi at her wit's end and having waited in vain to be reunited to her youngest child inspite of the Civil High Court custody order in her favour coupled with a further recovery order and on top of that, a committal order against her ex-husband, has once again knocked on the doors of this court.

[8] Flabbergasted and frustrated with the declared inaction on the part of the IGP, she has filed this application for judicial review for a mandamus to be issued to compel the IGP to execute both the warrant of committal and the recovery order of this court and a prohibition to restrain him from executing the custody orders of the Syariah Court.

[9] Keys terms of the recovery order include the following:

> 6 The Inspector-General of the Royal Malaysia Police or the relevant Commissioner of Police or Chief Police Officer shall control and direct the relevant and appropriate police officer(s):
>
> a. To investigate police report PUSAT/001175/14 dated 25-2-2014 ('the Report') with a view to determining the Defendant, Patmanathan A/L Krishnan

@ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), or Prasana Diksa's whereabouts.

...

d. To apprehend the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), for the purpose of obtaining information as to Prasana Diksa's whereabouts.

e. To file an affidavit in the cause herein and to serve a copy of the same on the Plaintiff's solicitors, exhibiting copies of the entries in the Diary of Proceedings in Investigation (under section 119 of the Criminal Procedure Code) with respect to the Report, within the first week of every month beginning from the month after service of a certified true copy of this order on the Royal Malaysia Police Headquarters at Bukit Aman, 50560 Kuala Lumpur.

PRINCIPLES

[10] The pivotal role of the courts in a judicial review application to scrutinise the action or inaction of the executive branch of the government and even to strike it down was underscored by the Indian Supreme Court in *SP Sampath Kumar v Union of India & Ors* AIR 1987 SC 386 at p 388 as follows:

> Now a question may arise as to what are the powers of the Executive and whether the Executive has acted within the scope of its power. Such a question obviously cannot be left to the Executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit be decided by the judiciary, *because it is the judiciary which alone would be possessed of expertise in this field, and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action* .... The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature ... It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. (Emphasis added.)

[11] The powers of the Civil High Courts in granting a prerogative writ and in this case a mandamus and an order of prohibition is conferred by para 1 of the schedule to the Courts of Judicature Act 1964 ('CJA'). Section 25(2) of the CJA reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have

the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[12] The schedule provides as follows:

SCHEDULE

Subsection 25(2)

ADDITIONAL POWERS OF HIGH COURT

Prerogative writs

1. Power to issue *to any person or authority* directions, orders or writs, including writs of the nature of habeas corpus, *mandamus*, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or *for any purpose*.

[13] The wide powers of the High Court in the context of an application for a mandamus was highlighted in the Federal Court case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 at p 662 by His Lordship Arifin Zakaria FCJ (as the CJ then was) as follows:

[67] As correctly stated the powers conferred by the Schedule upon a High Court are, according to its terms, 'additional powers'. that is to say, powers in addition to those already seised of by that court. Resort may therefore be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law. This is precisely the approach taken by the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, where it relied upon para 6 of the Schedule to found the necessary jurisdiction.

[68] In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Edgar Joseph Jr FCJ at p 195 observed that:

> ... that supervisory review jurisdiction is a creature of the common law and is available in the exercise of the courts' inherent power but its extent may be determined not merely by judicial development but also by legislative intervention.

[69] And it has been suggested, and I agree with it, that this power cannot be curtailed by the RHC (see *Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor* [2001] 4 MLJ 616). On the above premise I would hold that this application may properly be made pursuant to the power of court under s 25 and para 1 of the Schedule to the CJA.

[14] The said para 1 of the schedule to the CJA is in pari materia with art 226(1) of the Indian Constitution such that decisions of the Indian Supreme Court upon the analogous provision are accorded much weight and indeed are highly persuasive. See *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Another Appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665.

[15] The procedural rules with respect to an application for judicial review

are contained in O 53 of the Rules of Court 2012 ('ROC'). Suffice to say that no objection has been taken on procedural grounds as leave had already been obtained though objected to and there had been no appeal on the granting of leave. The parties are now at the inter-parte hearing of the application for mandamus and prohibition on its merits.

[16] In exercising its powers in judicial review this court is of course guided by the principles propounded by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433 that had approved the *locus classicus* in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374. His Lordship Edgar Joseph Jr FCJ in his supporting judgment for the majority observed as follows at pp 469–471:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See eg *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that *such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance*.
>
> In this context, it is useful to note how Lord Diplock defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:
>
> > By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the

A decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because B susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of C review which called for development. (Emphasis added.)

[17] As to the nature of a mandamus order the following is a helpful excerpt from *Halsbury's Laws of England*, (4th Ed Vol 1(1)) paras 128 and 132:

D The order of mandamus is of a most extensive remedy, and is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. An order of mandamus will be granted ordering that to be done which a statute requires to be done. Disobedience to mandamus is a contempt of court, punishable by fine or E imprisonment.

[18] The pivotal place of mandamus in public law was highlighted by the House of Lords in *The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney v John Walker and Sons* [1934] 1 AC 365 where Lord Wright F said at p 395 as follows:

I do not wish in any way to detract from the seriousness of the duties with which the Court is charged in dealing with an application for a writ of mandamus, or the importance of the Court giving the most liberal consideration in the interests of the G applicant. In the words of Lord Mansfield in *Rex v Barker*, 'A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. *It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific* H *remedy, and where in justice and good government there ought to be one.* Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. (Emphasis added.)

Whether the IGP has acted reasonably in refusing to execute the warrant of I *committal and recovery order of this court*

[19] The IGP is the chief law enforcer of the state. His office is established under s 5(1) of the Police Act 1967 ('the Act') and his powers and duties are as provided for under the Act. He commands the Royal Malaysia Police ('the

Force'). He is responsible to the Minister of Home Affairs for the control and direction of the Force and all other persons appointed or engaged for police duties as stated in s 4(1) of the Act. Section 3(3) of the Act spells out the purpose of the establishment of the Royal Malaysia Police as follows:

> Constitution of the Police Force
>
> 3(1) ...
>
> (2) ...
>
> (3) The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for *the maintenance of law and order*, the preservation of the peace and security of Malaysia, *the prevention and detection of crime, the apprehension and prosecution of offenders* and the collection of security intelligence. (Emphasis added.)

[20] The general duties of police officers are as provided under s 20(3) of the Police Act 1967 and in particular under s 20(3)(f) where a police officer may execute any warrant and other process lawfully issued by any competent authority as follows:

> General duties of police officers
>
> 20(1) ...
>
> (2) ...
>
> (3) Without prejudice to the generality of the foregoing provisions or any other law, *it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures* and do such lawful acts as may be necessary in connection therewith, *including*—
>
> (a) apprehending all persons whom he is by law authorised to apprehend;
>
> ...
>
> (f) *executing* summonses, subpoenas, *warrants*, commitments and *other process lawfully issued by any competent authority*;
>
> ...
>
> (j) giving assistance in the protection of life and property;
>
> ...
>
> (m) escorting and guarding prisoners and other persons in the custody of the police. (Emphasis added.)

[21] The word 'including' before sub-para (a) in s 20(3) does not ordinarily introduce an exhaustive list. Generally, the word 'including' itself means that the list is merely exemplary and not exhaustive: Scalia & Garner, *Reading Law, The Interpretation of Legal Texts*, pp 132–133, Thomson/West, USA, (2012). Thus, in commanding the Force, the respondent is at liberty to take any lawful

measures and do any lawful acts otherwise than that stipulated in ss 20(3)(a)–(m).

[22] There is of course a difference between 'power' and 'duty' in the context of a judicial review application. Whilst the IGP may use his discretion in the exercise of the powers conferred on and vested in him, he has no discretion when it comes to the execution of his duties. He must of necessity discharge his duties.

[23] The difference between 'duty' and 'power' in the context of administrative law has been elucidated with unrivalled clarity in, MP Jain & SN Jain's *Principles of Administrative Law* (6th Enlarged Ed, Vol 2, Wadhwa and Company, New Delhi, 2007). On the chapter entitled 'Duty, Discretion or Discretion Coupled With Duty' at pp 1230–1231 the learned authors expounded as follows:

> Discretionary power means that the authority has a choice to take an action, or refrain from taking an action. Discretionary power is of permissive or enabling nature and the concerned authority may or may not exercise the same.
>
> ...
>
> On the other hand, *having a duty means that the authority is obligated to take a prescribed action, and it has no choice in the matter. The authority must perform the duty as laid down in the law, and failure on its part to do so may result in the court legally enforcing the same.* Whether an authority has a discretion or is under a duty depends, in any particular case, on the interpretation put by the courts on the statutory provision in question.
>
> When a statutory provision says that the Administration 'shall' do this, it is usually regarded as a mandatory provision imposing a duty.
>
> ...
>
> Usually, the word 'may' is regarded as permissive; it is regarded as conferring a discretionary power on the concerned authority to do something if it chooses to do so. But, one can find instances in the case-law where the *courts have interpreted 'may' in a statutory provision as either imposing a duty, or conferring a discretion coupled with a duty on the concerned authority rather than conferring a power thereon*. By adopting interpretive techniques, it is possible for a court at times to interpret a statutory provision seemingly conferring a discretion as imposing a duty, or as conferring a power coupled with a duty.
>
> The expression *'discretion coupled with duty' has the connotation that the authority enjoying discretion is duty bound to exercise it*, or exercise it in a particular manner, when the conditions for the exercise of the discretion are present. (Emphasis added.)

[24] Where there is a breach of duty on the part of the police or a failure to exercise discretion properly in the discharge of one's duty, that duty and exercise of discretion may be enforced by a mandamus order.

[25] The applicant drew the court's attention to the case of *Regina v Commissioner of Police of the Metropolis, Ex Parte Blackburn* [1968] 2 WLR 893, where the English Court of Appeal agreed that a mandamus can issue to the Commissioner of Police to reverse his policy decision of not prosecuting gaming clubs for breaking gaming laws. The relief was however not granted given that counsel for the Commissioner had given an undertaking to court that the policy would be official revoked (at 904C). I agree that the statements made by all three Law Lords deserve utmost consideration:

> (at 902F-G) LORD DENNING, MR: I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. *The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone*. (Emphasis added.)
>
> (at 905A-C) SALMON LJ: In my judgment *the police owe the public a clear legal duty to enforce the law* — a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. *In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene*. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn.
>
> (at 913B-G) EDMUND DAVIES LJ: In this context Mr Worsley has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law. Carried to its logical limit, such a submission would mean that, however brazen the failure of the police to enforce the law, the public would be wholly without a remedy and would simply have to await some practical expression of the court's displeasure. In particular, it would follow that the commissioner would be under no duty to prosecute anyone for breaches of the Gaming Acts, no matter how flagrantly and persistently they were defied. Can that be right? Is our much-vaunted legal system in truth so anaemic that, in the last resort, it would be powerless against those who, having been appointed to enforce it, merely cocked a snook at it? The very idea is as repugnant as it is startling, and I consider it regrettable that it was ever advanced. How ill it affords with the seventeenth century assertion of Thomas Fuller that, *Be you never so high, the law is above you. The applicant is right in his assertion that its effect would be to place the police above the law*. I should indeed regret to have to assent to the proposition thus advanced on behalf of the respondent, and, for the reasons already given by my lords, I do not regard it as well-founded. On the contrary, I agree with them in holding that *the law enforcement officers of this country certainly owe a legal duty to the public to perform*

those functions which are the raison d'etre of their existence. (Emphasis added.)

[26] However the IGP has stated that both the Syariah Court custody order and the Civil High Court recovery order and warrant of committal are orders of a valid court and that he cannot choose one to execute in preference to the other. In taking such a stand, he has placed his own interpretation on the law to the substitution of that as pronounced by this court. This court had held that the custody order of the Syariah Court is null and void and of no effect and the Syariah Court had no jurisdiction over the granting of the said custody order. The ex-husband had tried to get a stay of the order of contempt but that was dismissed by this court.

[27] The applicant through her solicitors had also served on the respondent the grounds of judgment of this court in issuing the warrant of committal and the recovery order. Her solicitors had also highlighted the following parts of the judgment for the attention of the IGP:

(a) The Syariah Court has no jurisdiction to grant any custody order to the applicant's ex-husband (the converted Muslim spouse) as the applicant is not a Muslim, and that the Syariah Court is not competent to determine the issue of child custody when one of the spouses is a non-Muslim (p 56 line 3–7);

(b) Any Syariah Court custody order obtained by the applicant's ex-husband is thus null and void and of no effect (p 115 line 3–8); and

(c) The court had made the recovery order pursuant to the Child Act 2001 and it requires the police to recover the applicant's youngest daughter, Prasana Diksa (pp 147 (line 15)–159(line 19) and p 165(line 10–13).

[28] With respect to the order for committal the following was alerted to the IGP:

(1) the applicant's ex-husband has been guilty of contempt of court by breaching the High Court custody order when he neglected or refused to deliver Prasana Diksa to the applicant immediately (pp 14–18);

(2) the applicant's ex-husband stands committed to prison to be there imprisoned until he purges his contempt; and

(3) a warrant for committal is issued commanding every police officer to apprehend the applicant's ex-husband and him safely convey to the Tapah Prison, to be detained and kept in safe custody.

[29] There was then an appeal filed against the whole of the said orders by the father of the child. The Court of Appeal struck out the appeal on 10 September 2014 after having agreed with learned counsel for Indira Gandhi

that her ex-husband was out of time to file his memorandum of appeal and that in any event he had still been in contempt of court. As the whole appeal of Patmanathan had been struck out, there was nothing left of the learned Attorney General's application to intervene on his own behalf and on behalf of the IGP in the proceedings in the Court of Appeal as the main substratum of the appeal was no more. The intended intervening proceeding was to stay the recovery order and the committal order in A-029(IM)-1061–06 of 2014.

[30] In finding Patmanathan guilty of contempt, this court had held that the custody order of the Syariah Court was issued without jurisdiction and that the said order is null and void and of no effect. The Syariah Court custody order is irrelevant. He may not be happy with the finding of this court but until the recovery order and warrant of committal are stayed or set aside, it remains a valid order of this court and must be complied with. However, as pointed out, there is currently no appeal afoot challenging the validity of the recovery order and the warrant of committal.

[31] By refusing to execute the warrant of committal and the recovery order, the IGP would have committed an error of law, thus making his decision susceptible to a mandamus order to compel him to comply with the requirements of the law. The circumstances under which a decision maker may be said to have committed an error of law have been considered in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 at p 343; [1995] 1 CLJ 748 at p 765 Gopal Sri Ram JCA (later FCJ) observed as follows:

> ... In my judgment, the true principle may be stated as follows. An inferior decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an *error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he miscontrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.*
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted ... (Emphasis added.)

[32] The IGP was labouring under the misconception that there were two conflicting orders; one from the Syariah Court giving custody of the youngest child to the father and another order from the Civil High Court giving custody to the mother. Whilst that may be so, there is no order of recovery issued by the Syariah Court requiring the police to search for the child and to recover the child. That is obvious as the child is for all intents and purposes with the father.

[33] There is also no contempt order taken out by the father of the child from the Syariah Court as the mother is not in contempt of court. However there is a recovery order issued by the Civil High Court as well as a warrant of committal against the father of the child. Thus whilst there is no order for the police to execute from the Syariah Court, there are two orders for the police to execute issued by the Civil High Court which is the recovery order and the warrant of committal.

[34] It is of course for the father of the child and not for the police to raise the defence that because of the Syariah Court custody orders, this court in the application for the recovery order and the contempt application ought not to make an order for recovery and an order for contempt. However the father of the child had raised just that and this court had rejected the defence of a valid Syariah Court custody order.

[35] It is not then for the IGP to raise the same defence again as that had been raised by Patmanathan and found to be devoid of merits. It is too late in the day for the IGP to intervene in the contempt proceedings and the recovery action proceedings as both proceedings have been concluded. It has now become impossible for the IGP to intervene in the appeal of Patmanathan to the Court of Appeal because his appeal has been struck out by the Court of Appeal. Indeed the learned Attorney General's application to intervene on his own behalf and on behalf of the IGP had also been struck out as the primary appeal is no more.

[36] There are thus only the two Civil High Court orders for enforcement. The IGP then cannot refuse enforcement of the Civil High Court orders as that would be a derilection of his duty under the Police Act. Only the police is empowered to enforce a warrant of committal and not layman or any other persons. So too the recovery order for under the Child Act 2001 where the resources of the state may be employed to trace and recover a child pursuant to an order issued by the court.

[37] If his declared intention as admitted by him is that he would not execute the Civil High Court orders, then on order in mandamus shall be issued to compel him to act in accordance with the law.

[38] The IGP further erred in law when he laboured under the misapprehension that he may be subject to a contempt action if he had refused to execute the custody order of the Syariah Court or if he had proceeded to execute the two orders of the Civil High Court. To begin with there is no custody order for him to execute from the Syariah Court as there is no recovery order nor a committal order.

[39] Even if there is one, there is no mandamus order that may be issued by the Syariah Court against the IGP. The reason is obvious: the Syariah Court does not have the power to issue a prerogative writ and at any rate it has no jurisdiction over the IGP which is a public office that does not profess a religion unlike a human person and much less professing the religion of Islam. See the case of *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513. It must not be forgotten that the jurisdiction of the Syariah Court is only over persons professing the religion of Islam as provided for by the Ninth Schedule, List II, Item I of the Federal Constitution.

Whether until the two orders of the High Court are stayed, varied, reversed or set aside, the IGP has a duty to execute it and would be acting unreasonably in refusing to do so

[40] The High Court being a superior court established under the Federal Constitution and on which the judicial powers of the Federation are vested, does not act in vain. The orders issued by it cannot be disregarded with impunity and breach of it would give rise to enforcement proceedings, the most serious of which would be contempt of court. Powers are given to the High Court under the Federal Constitution, the CJA and the ROC to punish for contempt.

[41] Article 126 of the Constitution states that '... a High Court shall have power to punish any contempt of itself.' Section 13 of the CJA states that '...the High Court shall have power to punish any contempt of itself.'

[42] Paragraph 10 to the schedule (read with s 25(2) of the CJA) confirms that the High Court has the 'power to enforce a judgment of the court in any other manner which may be prescribed by any written law or rules of court.'

[43] Section 16(d) (read with s 17) of the CJA grants specific powers to the Rules Committee to make rules of court 'for regulating the enforcement and execution by a High Court of the decrees, judgments and orders of the Federal Court, of the Court of Appeal or of the other High Court'.

[44] Order 45 to 52 of the ROC and Forms 83 to 108 all relate to the court's powers of enforcement and execution.

[45] Order 45 r 5(1)(a) and (A) states that where a person required by an order to do an act within a time specified in the order refuses or neglects to do it within that time, then the order may be enforced, with leave of the court, *with an order of committal*.

[46] In particular, the body of Form 108 titled 'Warrant for Committal'. as prescribed by O 52 r 10, reads as follows:

> Whereas by an Order of this Court pronounced this day it was ordered that the abovenamed ..... do stand committed to ..... Prison for his contempt in the said Order mentioned. These are therefore to command you the Sheriff and *every Police Officer* to apprehend the said ..... and him safely convey to ..... Prison there to be detained and kept in safe custody. (Emphasis added.)

[47] As can be appreciated, breach of a court order is a serious matter and no one should even or ever entertain the thought of it. Respect for a court order is part of our respect for the rule of law which is the bedrock of every civilised society with functioning democratic institutions.

[48] A refusal to execute a warrant of committal which expressly called on the police to apprehend the contemnor and to escort him to the prison, in this case in Tapah, and there to be detained and kept in safe custody, would be to challenge the authority of an order issued by a superior court as provided for under art 121 of the Federal Constitution. It would be to denude the High Court order and warrant of committal of meaning and effect such that it is toothless not worth more than the paper it is written on.

[49] I agree with learned counsel for the applicant that such a decision frustrates the judicial power of the federation by rendering the court's power to order the enforcement of the custody order, through committal proceedings, ineffective and illusory. The decision is a gross misapprehension of the established fact that the High Court, at all times, commands the power to order the enforcement and execution of its judgments and orders. The decision is therefore tainted with an error of law and unreasonable in the circumstances of the case. The decision cannot be sustained and must yield to a mandamus order.

[50] Taking the argument of the IGP to its logical conclusion, it would mean that in a case of such an instance, the public can expect that the police will not act at all as both orders from the Syariah Court and the High Court are understood by him to be equally valid and so no offence has been committed by anyone not wanting to deliver the child to the other parent. Parties will just have to accept that the order of this court has no bite nor sanction and can be safely ignored with impunity. Worse still, it will be a case where might is right

as whoever is successful in wresting the infant from the other parent gets to keep the child as the police would not be lifting a finger to help either of the parents.

[51] That unfortunately would produce a very undesirable state of affairs where parties then will resort to their own means to enforce the law if they are so minded. Equally bad would be a case where one parent has to accept in quiet desperation the inevitable that might would be right in that whoever has taken the child from the other would have the right to keep the child and that the law is powerless to help.

[52] It would create a sense of frustration with the law and its enforcement which in a country where rule of law is upheld, would bring the very law into disrepute. When confidence in the law is eroded that would be the beginning of the end of our society governed by the rule of law and the Constitution.

[53] An order of this court might well be reversed on appeal but that is no justification for saying that it need not be complied with in the here and now. The two orders of recovery and committal remain valid orders of the High Court that compel compliance until it is stayed, varied, reversed or set aside.

[54] Learned counsel Mr Aston Paiva for the applicant referred this court to the Indian High Court case of *Satyanarayana Tiwari v SHOPS Santhoshnagar, Hyderabad and others* AIR 1982 AP 394 which states a fundamental principle of general law: that any finding or decision of this court prevails at all times until it is varied, reversed or set aside, and no anterior or subsequent enquiry or finding of the *police* can nullify the finding or decision of this court.

[55] In *Satyanarayana*, the civil court had passed an injunction in a civil suit restraining two individuals from interfering with a land which the applicant was in possession of. On apprehension of the injunction being contravened, the applicant obtained a direction from the civil court that the police shall help him maintain his possession of the land. Despite that, the applicant complains that the police are not rendering any help and the two individuals are likely to dispossess him. The applicant sought for a mandamus, under art 226 of the Indian Constitution, against the relevant police officers to render help to him in maintaining his possession of the land (at para 1, pp 394–395). In allowing the relief, the court held at pp 395–397 as follows:

> 3. *The legal position as observed by the learned single Judge does not admit of any doubt that the orders of the Civil Court prevail on the question of possession. Any anterior or subsequent enquiry and finding of the police or any other authority cannot nullify the finding of the civil court especially when that finding has been upheld by this court by dismissing the Civil Revision Petition*. The only authority that can vary that finding is the Supreme Court. None of the parties in this case have moved the Supreme Court

questioning the dismissal of the Civil Revision Petition. That being the position, *no authority in the State, revenue or police, can ignore the finding of the Civil Court of refuse to take steps to see that the order of the Civil Court is implemented and the party, in whose favour there is the order of the Civil Court, gets all help to maintain the law and order and not allow the other party to contravene the injunction order and create law and order problem*.

...

5. ... It is the duty of all the authorities in the State to see that the orders of the civil court and that of the High Court are not only *enforced faithfully* but all persons seeking enforcement of such orders are given full help and protection in furtherance thereof.

7. ... We have, therefore, no hesitation in concluding that this court has ample jurisdiction, to issue a writ or direction to all the authorities including the police within the State to enforce the orders of the civil court as confirmed by the High Court in a civil revision petition and *maintain the rule of law*. The police authorities are therefore bound to give all assistance to the appellant to enforce and see that the orders of this court as confirmed in C. R. P. No. 3258/81 are implemented and *any enquiry or report of any other authority, revenue or police cannot be put as an excuse for not rendering the required help to the appellant to maintain his possession.* (Emphasis added.)

[56] With respect to a warrant of committal, the following House of Lords case of *McGrath v Chief Constable of the Royal Ulster Constabulary and another* [2001] 4 All ER 334, referred by the applicant with respect to a warrant of arrest in England, is both illuminating and instructive. In *McGrath*, one Dominic Mackin who had been arrested told the police that he was Terence Joseph McGrath. He was subsequently charged in court for theft. The charge ran in the name of Terence Joseph McGrath, and Dominic Mackin pleaded guilty and signed his plea of guilt using the name Terence McGrath. His case was later fixed for sentencing where he failed to appear in court and a warrant of arrest was issued. The real Terence Joseph McGrath was then arrested and when it was found that he was not the person who had been previously detained (Dominic Mackin), he was released. Terence McGrath then makes a claim contending that he was arrested wrongfully, unlawfully and without reasonable cause (at [5]–[8]).The importance of obeying a warrant cannot be over-emphasized in the words of Lord Clyde as follows:

(at [17], [19] and [23]) Warrants issued by a court of law require to be treated with the same respect as must be accorded to any order of the court.

...

The granting of the warrant was a lawful judicial act and the validity of the warrant would remain until it was recalled or cancelled.

...

But I do not consider that the Court of Appeal was correct in requiring that the warrant could only be executed against the plaintiff if he had in fact been the person

who actually appeared before the sheriff and whom the sheriff intended to be arrested. That construction involves a questioning of what appeared clearly, even although mistakenly, on the face of the warrant. *Where there is no reason to question what appears on the face of the warrant, the constable enforcing it has no obligation to do so: indeed on the contrary he has the duty to enforce it. And if in executing it he complies with the terms of the instruction embodied in the warrant he should not be regarded as having acted unlawfully*. (Emphasis added.)

[57] Our Force by s 32(1) of the Act also enjoys the same protection:

Non-liability for act done under authority of warrant

32(1) Where the defence to any suit instituted against a police officer, an extra police officer, volunteer reserve police officer or an auxiliary police officer is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, *enter judgment in favour of such police officer*, extra police officer, volunteer reserve police officer or auxiliary police officer. (Emphasis added.)

[58] With respect to the recovery order, the IGP must consider the police report lodged on 25 February 2014 bearing number PUSAT/001175/14 ('Police Report') detailing Prasana Diksa's abduction by her ex-husband without her consent, in the hope that the police would investigate the matter under s 52 of the Child Act 2001. There is no averment in the IGP's affidavit that he had taken the police report into consideration in refusing to execute the two orders of the High Court.

[59] In fact what was prayed for in the recovery order is nothing more than ensuring that the provisions of the Criminal Procedure Code ('the CPC') are followed through by the police once a police report is lodged.

[60] Section 107(1) imposes a duty on the officer in charge of a police station ('the officer') to reduce to writing every information relating to the commission of an offence if given orally to him. This is the basis for the police report and every other police report made.

[61] Section 110(1) imposes a duty on the officer, if he has reason to suspect the commission of a seizable offence, to immediately send a report of the same to the public prosecutor and proceed in person or shall depute one of his subordinate officers to proceed to the spot to inquire into the facts and circumstances of the case and to take such measures as may be necessary for the discovery and, where not inexpedient, arrest of the offender.

[62] Section 120(1) imposes a duty on an investigating officer to complete

every police investigation without unnecessary delay, and the officer making the investigation shall submit to the Public Prosecutor a report of his investigation together with the investigation papers in respect of such investigation within one week of the expiry of the period of three months from the date of the police report.

[63] Subsequently, the applicant made two requests, on 8 April 2014 and 6 May 2014, for a report on the status of police investigation of the police report under s 107A(1) of the CPC but none had been provided as at 30 May 2014.

[64] Section 107A(2) of the CPC imposes a duty on the officer to give a status report on the investigation of the offence to the informant *not later than two weeks* from the receipt of any request made.

[65] Section 119 of the CPC imposes a duty on every police officer making a police investigation to day by day enter his proceedings in the investigation in a diary.

[66] As can be seen the recovery order merely echos what is ordinarily expected of the police to do upon a police report being made augmented by the further orders that the court may make under s 53(3) of the Child Act 2001.

[67] Mr Aston Paiva's extensive research led him to the case of *Chavunduka and Another v Commissioner of Police and Another* [2001] 2 LRC 77 where the Supreme Court of Zimbabwe boldly and courageously issued a mandamus against a Commissioner of Police for failing to investigate criminal acts by military personnel.

[68] In *Chavunduka*, the applicants, who were employees of a weekly newspaper, alleged that they were unlawfully detained and tortured by military personnel in an effort to extract information as to the sources utilised for an article written by them regarding a military coup attempt: (at 80a-e).

[69] The applicants submitted a lengthy written complaint to the Commissioner of Police, enclosing affidavits and medical reports. Charges of wrongful arrest and detention, aggravated assault and torture, were made against named and unnamed persons. The applicants requested the commissioner to investigate the charges. No response was forthcoming nor any proper investigation commenced: (at 81b-d). The applicants resorted to legal proceedings and in allowing their relief the Supreme Court held at p 82g as follows:

> *What then is the appropriate remedy where it has been shown that the police have not done something which obviously it is their duty to do—where there has been a dereliction*

of duty owed to the public? The answer is that in such a clear case the court will grant an order of mandamus. But where the police have arrived at the decision not to take any action in good faith and on the basis of a proper appreciation of the applicable law, they will not then incur the risk of judicial intervention. The police thus retain a very considerable freedom to formulate and implement general policies and to decide what to do in a particular situation. A substantial margin of discretion must be allowed them. (Emphasis added.)

[70] The court issued a mandamus against the Commissioner of Police compelling him to 'institute forthwith and/or carry forward to completion a comprehensive and diligent investigation of the offences alleged to have been committed against ... the applicants as detailed in the affidavits ..., with a view to the prosecution of all persons against whom there is a reasonable suspicion of complicity in the perpetration of such offences': (at 84e–f).

[71] In *Gu Kien Lee v Ketua Polis Daerah Kota Kinabalu Polis Diraja Malaysia* [2012] 7 MLJ 733, our High Court issued an order in the nature of mandamus against the District Chief Police Officer to investigate two police reports. In that case, a 31-foot yacht which belonged to the applicant, had been detained by one David Teo based on the allegation that the applicant owed David Teo an amount of RM52,000, which was disputed by the applicant. The applicant had then lodged two police reports but had not received any news from the police regarding the yacht. The applicant sought for an order of mandamus to direct the police to detain, secure and return her yacht to her. Abdul Rahman Sebli J (now JCA) found that ss 110(1) and 120(1) of the CPC made it 'incumbent on the police to investigate the two police reports lodged by the applicant' and for police investigation to be 'completed without unnecessary delay and the result thereon reported to the public prosecutor' respectively: at [3] and [14]. His Lordship found that while the police reports disclosed a possible offence of criminal misappropriation of property, punishable under s 403 of the Penal Code, no investigation was carried out by the police in respect of the reports: at [6], [9] and [15]. While not granting the specific relief sought for, His Lordship nonetheless made an order in the nature of mandamus against the district chief police officer to 'carry out a full and proper investigation into the two reports lodged by the applicant without further delay and to report the result of the investigation to the Public Prosecutor or the Deputy Public Prosecutor pursuant to s 120(1) of the CPC': at [19]. This court had given its reasons why the recovery order and the order of committal had to be issued. Parties affected would of course have the right of appeal and the applicant's ex-husband Patmanathan did appeal but his appeal had been struck out. His application for stay before this court had been dismissed and his stay in the Court of Appeal could not be heard and was struck out because he had not purged his contempt. With no proceedings pending at the Court of Appeal, there was nothing for the learned attorney general to intervene at the appeal stage to be heard, be it on stay of the two orders of this

court or on any matter arising out of it.

[72] So what we have is a case where final orders of this court do not need be enforced because of the interpretation and understanding of the law by the IGP. This cannot be the situation in our country where the superior courts have been entrusted to hear disputes and make orders binding on the parties and to discharge its constitutional duties to interpret the law. That would be a very serious and sorry state of affairs.

[73] The IGP is of course entitled to have his personal views expressed but when it comes to the execution of his duties as prescribed under the Police Act, then he must put personal opinions aside and do what the call of duty would constrain and indeed compel him to do.

[74] There is no two ways about it. Otherwise no one would have any respect for the courts established under the Federal Constitution and the order it makes.

[75] The IGP in not wanting, in the circumstance of this case where this court has clearly stated that it is this court's order that must be enforced, would be acting unreasonably and indeed illegally, in the language of administrative law.

Whether the requirments of s 44 of the Specific Relief Act 1950 have been fulfilled for a mandamus to be issued against the IGP

[76] Under the Rules of Court 2012 ('ROC'), the exercise of the power of the Court to grant a mandamus can also be evaluated from the perspective of compliance with the requirements of s 44 of the Specific Relief Act 1950 ('SRA'). It has been held by the Federal Court in *Petrojasa*'s case that the scope of the powers of the High Court under para 1 of the Schedule to the CJA is much broader than that under s 44 of the SRA where the latter seems to be confined to specific act to be done 'by any person holding a public office'. Section 44 of the SRA appears under Chapter VIII as follows:

> CHAPTER VIII
>
> ENFORCEMENT OF PUBLIC DUTIES
>
> Power to order public servants and others to do certain specific acts
>
> 44(1) A Judge may *make an order requiring any specific act to be done or forborne, by any person holding a public office*, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that —
>
> (a) an application for such an order be made by some person whose property, franchise, or *personal right would be injured by the forbearing* or doing, as the case

may be, *of the said specific act*;

(b) *such doing or forbearing is*, under any law for the time being in force, *clearly incumbent on the person* or court in *his* or its *public character*, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is *consonant to right and justice*;

(d) the *applicant has no other specific and adequate legal remedy*; and

(e) *the remedy* given by the order applied for *will be complete*. (Emphasis added.)

[77] As the term 'public office' is not defined under the SRA, one turns to the Interpretation Acts 1948 and 1967 (Act 388) ('IA') which defines as follows:

'public office' means an office in any of the public services;

'public officer' means a person lawfully holding, acting in or exercising the functions of a public office.

[78] Article 132(1) of the Federal Constitution further states that 'public services' are as follows:

132(1) For the purposes of this Constitution, the public services are

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) *the police force*;

(e) (Repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service. (Emphasis added.)

[79] The IGP as the respondent is of course a person holding a public office in that it is an office in any of the public services which include the police force. The five requirements to be satisfied under s 44 of the SRA are said to be cumulative as was held in *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b where Sharma J at p 181 observed as follows:

Five conditions are laid down in s 44 and these conditions are the five provisos contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled.

[80] The *first condition* is that the applicant's right would be injured by the forbearing of the act of executing the warrant of arrest and the recovery order. This court, having convinced that the applicant's ex-husband has no valid

defence or excuse in not complying with the custody order granted by the Civil High Court, had found the ex-husband guilty of contempt of court and had issued an order of committal to prison until the contempt is purged. He has not purged the contempt and his application for stay of the committal order before this court had been dismissed and the Court of Appeal had also subsequently struck out his application for stay of the committal order and the custody order.

[81] The applicant has a personal right that would be injured if the warrant of committal and the recovery order are not executed by the IGP. She has the right to call on the IGP to execute the two orders of the High Court for all court orders are to be complied with and they cannot be disregarded with impunity. Confidence in the judicial process will be seriously and sorely compromised if a court order is worth nothing more than the paper it is printed on, with no bite or sanction.

[82] Her right as a mother of the child is further entrenched under the Guardianship of Infants Act 1961. Her right as the mother of the child with custody rights over the child had been recognised and granted by the Civil High Court in a hearing pursuant to the Law Reform (Marriage and Divorce) Act 1976 and again her ex-husband's appeal against the Civil High Court custody order had been struck out. She is at the end of the tether really when it comes to enforcing the two orders of the High Court. She has more than satisfied the first requirement under proviso (a) to s 44 of the SRA.

[83] The *second condition* is that the doing or forbearing of the act is under the law, clearly incumbent on the person, in this case the IGP, in his public character. Parliament in its wisdom has entrusted it to the police and no other, to execute warrants and other process validly issued by any competent authority. The police is best equipped, trained and have the relevant expertise and most importantly, empowered by the law to execute, in this case a warrant of committal. Section 20(3) of the Police Act imposes a duty on him to carry out the purpose for which the Force was established under s 3(3) of the Act and for that purpose he may apprehend all persons whom he is by law authorised to apprehend. The warrant of committal is of course an order of the court directing him to arrest one Patmanathan and to escort him to the Tapah prison and there to remain until the contempt is purged. The lawful actions expected of and exacted on the police would be the ones as enumerated in ss 20(3)(a), (f), (j) and (m) of the Police Act as reproduced above. These are duties of a public character associated with the office of the IGP under s 3(3) of the Act in the nature of maintenance of law and order, the prevention and detection of crime and the apprehension and prosecution of offenders.

[84] By wilfully refusing to allow the applicant mother to have custody of the youngest child, the father would have committed an offence under s 52(1) of

the Child Act 2001 and is thus an offender for having abducted the child from her lawful custody. Part VIII of the Child Act is entitled 'TRAFFICKING IN AND ABDUCTION OF CHILDREN.' The relevant provisions are ss 52 and 53. It is apposite to append here the observation of this court in the committal and recovery orders proceedings:

> Section 52(1) of the Child Act 2001 makes it a criminal offence for any parent or guardian who does not have the lawful custody of a child to take or send out a child, whether within or outside Malaysia, without the consent of the person who has the lawful custody of the child. The offence is punishable with a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding fiveyears or to both. Section 53(1) of the Child Act 2001 empowers the Court to make a 'recovery order' where there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child.
>
> Section 53(3) stipulates that a 'recovery order' may:
>
> (a) direct any person who is in a position to do so to produce the child on request to any authorized person;
>
> (b) authorize the removal of the child by any authorized person;
>
> (c) require any person who has information as to the child's whereabouts to disclose that information to the authorized person;
>
> (d) authorize any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.
>
> I agree with learned counsel for the plaintiff that reading both sections 52 and 53 of the Child Act 2001 together illuminates the intent of Parliament in enacting these provisions i.e. to prevent instances of child abduction by spouses who do not have lawful custody of a child. The reliefs in the application largely mirror that in *Legasri Purana Chandran v Sreepathy Ganapathy Krishan Iyer* [2010] 8 CLJ 208 at 211F-212D, 221D and 225E, HC where the said orders were granted.

[85] The *third condition* is that the issuance of a mandamus order would be consonant to right and justice. The attempts by the applicant's ex-husband to set aside the Civil High Court custody order have failed in the Court of Appeal and the Federal Court had refused leave to appeal to it. The attempt of the ex-husband to stay this committal order and with it the warrant of committal together with the recovery order has also failed in the court of Appeal and indeed the whole of the appeal by Patmanathan had been struck out by the Court of Appeal. It is thus both right and consonant with justice that the order for mandamus against the IGP be made as he has openly declared and has confirmed in his affidavit to oppose this application that he would not execute the warrant of committal or the recovery order.

[86] The applicant, as the mother of the child of her womb, had been deprived of her child when the child was forcibly taken from her when she was hardly a year old. The child was still nursing at her mother's breast. No words

can begin to describe the pain and agony of being separated from her child and that inspite of the High Court custody order in her favour followed by a warrant of committal issued against her ex-husband for contempt and the resources of the state being invoked with respect to the recovery order. Hope deferred makes the heart sick. Hope dashed brings in its wake such searing pain of deepest sorrow. Like all, she looks to the law to redeem her from her hopeless state and to give her back her child. A grave injustice has been done to her and this court must act firmly and fairly to give her what is due her — custody of her child from whom she has been separated these five long and lingering years.

[87] The *fourth condition* to be met is that the applicant has no other specific and adequate legal remedy. There is clearly no other way for the applicant to be reunited with her youngest child. If the police would not help in executing the warrant of committal then who else could help? If the resources of the State at the disposal of the police cannot be harnessed to find the child for her and to bring the child to her, then the vast powers of the court in shaping the recovery order would be mere pious platitudes and the State's commitment to safeguarding the welfare and interest of the child and to provide for care and protection of the child without discrimination as to race, colour, sex, language, religion or any other status would be hollow promises. It must not be forgotten that the Child Act 2001 was promulgated based on the principles enumerated in the Convention on the Rights of the Child ('CRC') which Malaysia acceded to in 1995.

[88] It is very telling that the permanent representative of Malaysia to the United Nations in a letter dated 23 April 2010 addressed to the President of the General Assembly, which letter was publicly released by the UN General Assembly on 3 May 2010, had stated Malaysia's commitment in support of its candidature for the human rights council for the period from 2010 to 2013 as follows in the following excerpts:

> *Our efforts at promoting and protecting human rights*
>
> *National level*
>
> 13. At the national level, Malaysia is actively seeking to promote and protect human rights through efforts in various fields.
>
> *Laws and legislations*
>
> 14. Since independence in 1957, our efforts to promote and protect human rights have been reflected in our laws and regulations. These include:
>
> ...
>
> 14.4. *Child Act 2001, Act 611* - safeguarding the welfare and interest of children which was promulgated *based on the principles enumerated in the Convention on the Rights of the Child (CRC)* which Malaysia acceded to in 1995. This Act includes provisions for care, protection and rehabilitation of a child without discrimination as to race, colour, sex, language, religion, social origin or physical,

mental or emotional disabilities or any other status.

...

Other measures at the national level

29. The aforementioned efforts at the national level are also supplemented by the following:

...

29.2. *The Government continues to ensure that Malaysian practices are compatible with the provisions and principles of the Convention on the Rights of the Child (CRC)*, Committee on the Elimination of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD) *for issues such as dissolution of marriage, maintenance, custody, inheritance and determination of the religion of the child of a civil marriage during conflict resulting from one of the spouses converting to Islam*;

...

29.4. Safeguarding the welfare and interest of children as per its Child Act 2001 which was promulgated based on the principles specified in the Convention on the Rights of the Child (CRC) which Malaysia acceded to in 1991.

Our commitments and pledges:

...

Continuing efforts to raise human rights awareness among all segments of the population including law-enforcement officials, members of the judiciary, government officials and other stakeholders (Emphasis added.)

[89] What we declared in the august hall must now be followed through with avowed haste for our action must not fall short of our declaration lest our very sincerity be called in question. She cannot be expected to enforce the warrant of committal and the recovery order on her own for she has not been empowered to do so by the law. Far be it for her to take the law into her own hands and to enforce the two orders of court on her own. Parliament in its wisdom has entrusted such a delicate and difficult task to the police and its chief law enforcer, the IGP. They are endowed with power by the Police Act to enforce the law and entrusted by the people through their elected representatives in parliament to apprehend offenders, investigate offences and prosecute those who flout and frustrate the law.

[90] She has exhausted all avenues and remedies. She has tried the soft approach by service of the High Court custody order on her ex-husband. That having failed, she had proceeded with a contempt action and obtained a committal order for committal of the ex-husband to prison until he purges his contempt by delivering the child for custody to her. A warrant of committal to prison had been issued and served on the IGP together with the recovery order only to be met by the wall of inaction by the IGP on his perceived

understanding and interpretation of the law that to enforce the two court orders will bring him into contempt of the Syariah Court custody orders. In plain language, the IGP is telling her that her two orders from the High Court are of no avail and that she cannot expect the police to execute the orders as provided for by law for there is a legal quandary here: both the custody order of the Syariah Court and the custody order of the High Court carry equal weight and both being in direct conflict with each other, the police cannot be expected to prefer one to the other.

[91] She is thus left without any adequate legal remedies. She looks to the law for redress; she must not be turned away on ground that there is a lacuna in the law and that the law is powerless to grant her the remedy she had been given for the chief enforcer of the law would not enforce it though ordered by a court of law to do so. It defies logic, disturbs the conscience and dispels the belief that a superior court established under the Federal Constitution shall not act in vain. A mandamus order is the only appropriate order for this court to make as that is the only recourse open to her under the law.

[92] The *fifth and final condition* to be fulfilled is that the remedy given by the order applied for will be complete. I have no doubt that the warrant of committal if executed by the police with instruction coming from the IGP would vindicate the law and all those who respect its writ. With respect to the recovery order, I stand by what I had observed in the recovery order proceedings as follows:

> I have no doubt that by granting the orders prayer for in Enclosure 17, the police with the resources of the State behind them, might well be able to find the husband and with that the child as well. *A specific order of this nature would clarify for the police that it is not for them to fold their arms in quiet desperation, powerless to spring into action, on ground that there is a Syariah High Court custody order that allows the husband to have custody of the youngest child*. I have no hesitation to grant an order in terms of Enclosure 17 and I so order with costs of RM5,000.00 to be paid by the defendant to the applicant. (Emphasis added.)

[93] All the five conditions under s 44 of the SRA having been met, I am convinced that an order for mandamus to compel the IGP to execute the two orders validly issued by this court would be the only proper thing to do.

PRONOUNCEMENT

[94] The IGP's stand is that he is hemmed in between two equally valid custody orders emanating from two systems of court; one Syariah Courts for Muslims and the other Civil High Courts for the rest. However, even if there is a conflict of laws here within the same federation, this court had resolved it for the reasons already given. It remains for the chief law enforcer to enforce the

law as declared by the superior courts established under the Federal Constitution of which this High Court is one.

[95] The IGP may have his personal views on the law but when the crunch comes in the discharge of his duty to enforce the law, he must of necessity enforce the law as may be interpreted by the superior courts of which the High Court of Malaya is one. That court had already held that it is the Civil High Court that has jurisdiction in a case of custody orders with respect to a child of a civil marriage under the Law Reform (Marriage and Divorce) Act 1976 eventhough the father of the child had converted to Islam after the birth of the child. This court had also held that the custody order of the Syariah Court granting custody of the child to the father is null and void and of no effect for want of jurisdiction. This court had also granted a recovery order based on the antecedents of the case where the father of the child continues to conceal the whereabouts of the child and refuses to hand custody of the child to the mother.

[96] Until the above orders are stayed, set aside or reversed, the above orders of this court remain valid orders and no one can flout it with impunity. Even if the orders should be reversed on appeal, they remain valid orders that must be complied with unless a stay has been obtained.

[97] In all the circumstances of the case, this must be a very rare application indeed for a mandamus against the IGP and an even more rare order granted by this court for a mandamus to be issued against the IGP for the execution, within seven days from the service of this order, of both the warrant of committal and the recovery order under s 53 of the Child Act 2001 both dated 30 May 2014 validly issued by this court of competent jurisdiction in OS No 24–513 of 2009 as prayed for in Encl 1.

[98] There was also a prohibitory order prayed for to restrain the IGP from executing the Syariah Court custody orders but that would not be necessary if the mandamus order is so expressed that the execution of the two orders of the warrant of committal and recovery order is to the exclusion of the Syariah Court custody orders and I so ordered.

[99] It is to be noted that so far there has not been any order from the Syariah Court directing the IGP to execute.

[100] The public has an expectation that the IGP being the chief law enforcer would execute his duties fairly and firmly, without fear or favour and that as we celebrate Malaysia Day (16 September), we can yet affirm that we are a country where the rule of law prevails, that no one is above the law and that the courts as established under the constitution do not act in vain.

[101] Being a matter of public interest, I exercised my discretion and made no order as to costs.

POSTSCRIPT

[102] After the order for mandamus was issued, the learned SFC En Noor Hisham for the IGP, had orally applied for a stay of the mandamus order. He submitted that the state of controversy is a special circumstance by itself. According to him, if the decision is not stayed, then other appeals concerning issue of jurisdiction would be rendered nugatory.

[103] This was objected to by learned counsel for the applicant, Mr Aston Paiva. I agreed with him that generally there is no stay of a prerogative writ for if a stay is granted, the court would be indirectly affirming the breach of a public duty.

[104] I agree that the way this decision may affect pending cases does not affect the execution of this court's order.

[105] In any event there is no special circumstance justifying stay. While we may pause to ponder and to process the law and then to later pontificate and propound on the legal principles and precepts, the child grows older with the passage of time, by the day, the weeks, the months and the years. The appeal if successful cannot prove to be nugatory as all that happens would be that the child be returned to the father with the mother having reasonable access. The Syariah Court custody order does not prevent the mother applicant from having reasonable access to the child.

[106] We must not forget to put a human face to the law and here it is a case of a mother having to wait for five years to see and to be restored to the child of her womb. Nothing can compensate for the lost years.

[107] The oral application for stay was dismissed and the learned SFC is at liberty to apply to the Court of Appeal for stay.

[108] Parliament has entrusted it to the police and to them alone to execute all warrants of committal and recovery orders. The police alone has the power, experience and expertise including the resources of the state to carry out such a duty. The matter assumes greater urgency when it is asked: If not you, the police, then who? If not now, then when?

Application allowed without costs.

Reported by Afiq Mohamad Noor